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CONVICTION OF INFAMOUS CRIME MUST PROCEED UPON INDICTMENT.

The Supreme Court of the United States has just held, in United States v. Moreland, that imprisonment at hard labor is an infamous punishment, connoting the commission of an infamous crime, within the meaning of the Constitution of the United States, and may therefore not be lawfully inflicted unless the convicted person has been indicted by a grand jury. The decision was based on the Fifth Amendment of the Constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime unless upon a presentment or indictment of a grand jury." A majority of the Court found that non-support, in the case under review, was an infamous offense, inasmuch as conviction exposed the accused to confinement at hard labor.

Justice McKenna wrote the opinion of the Court, while a dissenting opinion, concurred in by Chief Justice Taft and Justice Holmes was filed by Justice Brandeis.

It is said that this decision makes it impossible for the Juvenile Court of the District of Columbia to punish for non-support, for the reason that the statute under which the Court operates provides for that offense, as an alternative to a fine of not more than $500.00, imprisonment in the District workhouse at hard labor for not more than a year.

The Court held that it is what sentence can be imposed under the law, not what was imposed, that is the material consideration. In other words, when the accused is in danger of infamous punishment if convicted, he has a right to insist that he be not put upon trial except upon accusation of a grand jury.

Justice McKenna cited the case of Wong Wing who was tried before a Commissioner of the Circuit Court for the Eastern District of Michigan and adjudged to be unlawfully in the United States and not entitled to remain therein. It was also ordered that he be imprisoned at hard labor in the Detroit House of Correction for sixty days. Referring to this case Justice McKenna said.

"The power of arrest by the executive officer and the power of deportation were sustained, but the punishment provided for by the act, and which was pronounced against Wong Wing, that is, imprisonment at hard labor, was decided to be a violation of the Fifth Amendment, he not having been proceeded against by presentment or indictment by a grand jury."

It has heretofore been held that imprisonment at hard labor, compulsory and unpaid, is in the strongest sense of the words involuntary servitude for crime. In other words, it has been declared that if imprisonment was in any other place than a penitentiary and was to be at hard labor, the latter gave it character, that is, made it infamous, and brought it within the prohibition of the Constitution.

Justice McKenna declared that the case involves more than the mere delivery from punishment of one who has defied the orders of the Court by refusing to support his minor children. "It concerns the recognition and enforcement of a provision of the Constitution of the United States expressing and securing an important right. And the right at times must be accorded one whose conduct tempts to a straining of the law against him."

In the dissenting opinion filed by Justice Brandeis, he contends that this case differs from that of the Wong Wing case, as the punishment in that case was imposed under an executive order and not under sentence of Court or conviction by jury. Justice Brandeis then goes on to say:

"It is whether the mere fact that the act prescribes hard labor as an incident of the sentence of confinement in the workhouse, renders the offense an infamous crime within the prohibition of the Fifth Amendment."

Justice Brandeis points out that the District workhouse, which is at Occoquan, in Virginia, is an industrial farm, with well equipped buildings in healthful and attractive surroundings. The inmates are engaged in farming, fruit raising, dairying, brick making, saw mill operations, road building and other outdoor pursuits; that the eight hour day prevails; that the farm has a library, a school and a hospital, and that there are no walls, cells or bars to retain the inmates. He declares that the dominant purpose of the institution is not punishment but rehabilitation; that the compulsory labor is in a larger sense compulsory education, and that in the case of those who are committed for non-support, it serves also the purpose of compelling the performance of a parental duty imposed by the common law.

The majority of the Court, however, seemed to consider the case from a somewhat broader viewpoint, and ignored the special features of the particular case. Hard labor in connection with penal servitude it holds to be infamous punishment, and the punishment being infamous it follows that the offense is infamous.

B.

SALESMAN INJURED ON WAY TO OFFICE TO REPORT SALES ENTITLED TO COMPENSATION.—A salesman, after stopping at home for lunch, started to walk to the employer's factory to report sales and settle up for the week, turn in expense account, collect his salary, and get instructions for the following week. He was struck and injured by an automobile while in the act of boarding a street car. Held that the injury arose out of and in the course of his employment, and that he was entitled to compensation. Porter Co. v. Industrial Commission, — Ill., 133 N. E. 652. We quote from the opinion of the court as follows:

"Whether one en route to his place of employment is in the line of his employment, in the sense that an injury received while so en route arises out of and in the course of that employment, depends upon the circumstances of each case and is largely one of fact. Wabash Railway Co. v. Industrial Com., 294 Ill. 119, 128 N. E. 290. The rule is that the accident must be suffered in the course of the employment, in the doing of something which the employee may reasonably do at any time during which he is employed and at a place where he may reasonably be during that time to do that thing. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; Central Garage v. Industrial Com., 286 Ill. 291, 121 N. E. 587. It was held in Walsh Teaming Co. v. Industrial Com., 290 Ill. 536, 125 N. E. 331, that the act of obtaining a receipt was in the line of the employment or an incident of the same, and that an injury received by an employee while engaged in securing the receipt arose out of and in the course of his employment. Here a fair construction of the employee's testimony is that his services for the week had not ended; that he was on his way to the factory to report his sales, receive instructions as to his duties for the next week, and collect his salary. We are of the opinion that such shows him to have been within the line of his employment. Schweiss v. Industrial Com., 292 Ill. 90, 126 N. E. 566. The fact that he found it convenient on his way to the office to get his lunch at his home and stopped there for that purpose is not sufficient, of itself, to take the accident out of the provisions of the Workmen's Compensation Act."

OIL AND GAS LEASES.*

This paper is confined to a consideration of a few of the fundamentals more or less peculiar to the so-called oil and gas leases.

In the very beginning we are met with a wide variety of judicial expressions as to the legal classification to be given to an oil and gas lease. That such an instrument is valid is universally conceded; that under it the lessee (so-called) acquires an interest of some character, with the right of protection, is also conceded. But when we come to ascertain just what legal phraseology is to be used in describing such instruments, and the exact nature of the rights acquired thereunder, we are met with a bewildering difference of opinion, or, at least, difference of expression.

In the earlier decisions of that pioneer oil and gas state, Pennsylvania, we find a straight-out declaration that the grant of the right to prospect for oil and gas is a mere personal license, irrevocable perhaps, but not assignable; the Pennsylvania court

*Revision of an address by Hon. Le Wright Browning before the Kentucky State Bar Association.

followed this holding to its logical conclusion, declaring that the attempted assignment of such a grant terminated all the rights of both the original licensee and his attempted assignee.[1]

These earlier decisions, cited first with caution and later with suspicion, were so manifestly unjust in their practical results that it is not surprising that the Pennsylvania court found a way out of the legal cul-de-sac thus created. The method of escape is clearly pointed out in the comparatively recent case of Barnsdale v. Bradford Gas Co.,[2] wherein the court draws the distinction between an instrument which, on the one hand, expressly grants and demises *certain land* for the purpose of oil and gas exploration and one which merely grants, not the land itself, but the mere right to explore. It is expressly held that an instrument such as the first one is a *lease;* by implication it is also held that an instrument of the latter character is a mere license, and as such subject to all the limitations imposed by the earlier decisions above referred to. A similar distinction has been drawn by the Supreme Court of California;[3] it also seems to have received the implied endorsement of at least one decision of the Ohio Supreme Court,[4] and of Judge Cochran in Lindley v. Raydure,[5] and in an unreported opinion in Zeigler v. Hopkins.

It seems to me that this distinction thus attempted to be drawn between an instrument which expressly demises certain described lands for the limited purpose of oil and gas exploration, and one which merely grants the right of exploration, is forced and artificial, and without any basis of sound legal reasoning. I think it will be conceded that even under a grant of the mere naked right of exploration the grantee acquires the right to use the surface of the land so far as may be necessary to carry into effect the right of exploration. This right, though acquired by implication, is nevertheless obtained under and by virtue of the terms of the lease. It is exactly the same right, no more and no less, that is acquired where the instrument expressly demises the surface for the limited purpose of exploration. In both cases the rights acquired in the land itself are the same, in one by express terms, in the other by necessary implication. In both cases such right is derived from the instrument alone. It, therefore, would seem clear that the distinction attempted to be drawn is indeed a distinction without a difference, and that if either instrument is a lease, then both are. I can't help but think that this artificial classification is the result, in large part, at least, of the early Pennsylvania decisions, to which I have referred. And even as to instruments which do not expressly lease the land itself, it seems that the effect of the later Pennsylvania cases is to entirely repudiate the conclusions reached in the earlier decisions, for, in at least one late case, it has been expressly held that such an instrument is more than a mere license, and that it creates an interest in the land.[6]

It is also to be noted that, largely influenced by these Pennsylvania decisions above referred to, the Oklahoma courts until recently adhered to the theory that an "oil and gas lease" was a mere license or option, transferring no interest in the freehold, and revokable at the will of the lessor at any time prior to the actual development of the property by the lessee. This conclusion is reached, and the previous Oklahoma decisions reviewed in the case of Brown v. Wilson,[7] which case is now chiefly valuable because of the strong dissenting opinion by Judge Kane, his views therein expressed being subsequently adopted and the majority

(1) Frank v. Haldeman, 53 Pa. 229; Dark v. Johnson, 55 Pa. 164, 93 Am. Dec. 732.

(2) 225 Pa. 338, 74 Atl. 207, 26 L. R. A. (N. S.) 614.

(3) Kline v. Guaranty Oil Co., 167 Cal. 476, 140 Pac. 1.

(4) Harris v. Oil Co., 57 Ohio St. 129, 48 N. E. 506.

(5) 239 Fed. 928.

(6) McKean Nat. Gas Co. v. Wolcott, 254 Pa. 323, 98 Atl. 955.

(7) 160 Pac. 94, L. R. A. 1917 B, 1184.

opinion overruled. In two very thorough and exhaustive opinions[8] which, I may say in passing, were obviously to no small degree the result of Judge Cochran's decision in Lindley v. Raydure.[9] And so we find Oklahoma, like Pennsylvania, abandoning the idea that an "oil and gas lease" is a mere license, revokable at the will of the lessor, and reaching the conclusion that under such an instrument the lessee acquires a vested interest in land covered by the lease, and as such entitled to protection.

I have referred specifically to the Oklahoma and Pennsylvania decisions, because, so far as I am aware, they are the only jurisdictions in which it has ever been definitely held that an "oil and gas lease" was simply a grant of a mere license, and as such revokable at the will of the lessor at any time prior to the actual entry and development by the lessee. It is true that we find many decisions, in which, through carelessness or inadvertence, an oil and gas lease is referred to as a license, and in this category are some earlier Kentucky decisions, to which I will hereafter refer, but these same decisions recognize that the "license" so-called is irrevocable, is coupled with an interest, and is assignable, and when you endow a "license" with such attributes it becomes in effect a "lease," regardless of the phraseology employed in describing it. Other courts in the search for a suitable nomenclature, and prompted perhaps by a pardonable desire to display legal erudition, have characterized such an instrument as an incorporeal hereditament, or a corporeal hereditament, or a freehold estate, or a chattel real.[10] The particular word or phrase that may be used to describe the instrument is not material, and as the West Virginia court said:[11] "Such dissimilarity as may seem apparent is really inconsequential—they are in fact the same, and not essentially different." The important consideration is, does the lessee upon the execution of the instrument acquire any vested right or estate, and if so, what? I say this is the important consideration, for unless some right or estate vests in the lessee, the lease will, as hereinafter be seen, become subject to an attack based upon the theory that being purely executory, it is void for lack of mutuality.

That an estate of some character vests in the lessee immediately upon the execution of the instrument, and that to such an extent it is an executed, and not an executory instrument, is, I believe, since the clearing away of the clouds in Pennsylvania and Oklahoma, accepted in every oil and gas jurisdiction in the country, with the possible exception of Texas, which state reveals such a maze of conflicting decisions as to defy analysis. Of the many decisions which discuss the character of estate acquired by the lessee upon the execution of the instrument, and whether it is to be treated as purely executory, or, in part, at least, executed, it seems to me that the clearest statements are to be found in Judge Campbell's opinion in Shaffer v. Marks,[12] Judge Cochran's opinion in Lindley v. Raydure,[13] and in the Oklahoma cases of Northwestern Oil & Gas Co. v. Branine,[14] and Rich v. Donaghey,[15] all of which are well worth careful study by anyone interested in the general subject under consideration. But for conciseness and succinctness, I would prefer the language used by Judge Cochran in overruling a motion to dismiss in the case of Zeigler v. Hopkins,[16] and, because the opinion is not reported, I think what was there said is well worth repetition here. It is as follows:

"Such an instrument is a grant. It provides, in so many words, that the lessor

(8) Northwestern Oil & Gas Co. v. Branine, 175 Pac. 533, 3 A. L. R. 344; Rich v. Donaghey, 177 Pac. 86, 3 A. L. R. 352.

(9) 239 Fed. 928.

(10) Morrison's Oil & Gas Rights, page 57.

(11) Johnson v. Armstrong, 81 W. Va. 399, 94 S. E. 753.

(12) 241 Fed. 139.

(13) 239 Fed. 928.

(14) 175 Pac. 533, 3 A. L. R. 344.

(15) 177 Pac. 86, 3 A. L. R. 352.

(16) In the United States District Court, Eastern District of Kentucky.

does thereby 'grant, devise and let.' And it purports to grant two distinct things, to-wit, the oil and gas in and under the land, and the land itself for the purpose of exploring for and producing oil and gas. In so far as the oil and gas is concerned, the grant is nugatory. Those substances in place are not the subject of grant by the lessor, the owner of the land. This is so because he does not own them. They do not become the property of anyone until found and produced and then they become the property of the lessee, the producer. His acquisition of ownership thereof then is the result of his own act of production. He acquired no interest therein by the act of the owner in making the lease. All he acquired thereby is the opportunity to produce. But no conceivable reason can be put forward against the position that the grant of the land for the limited purpose of exploration and production does not take effect immediately upon the delivery of the instrument to the lessee by vesting in him an interest in the land. The instrument purports so to do and there is nothing in the way of its so doing. The matter, however, should be put more accurately than this. At first an interest in the land for the purpose of exploration alone vests. In the nature of things it cannot vest for the purpose of production until one of the substances to be produced is found by exploration. But immediately upon its being found, such interest for the purpose of exploration ceases and that for production begins, *i. e.*, vests. The vesting of an interest in the land for production may, therefore, be said to depend upon a condition precedent, to-wit, the finding of one of the substances to be produced. This being so, the lease is an executed, and not an executory, instrument. Immediately upon its delivery an interest in the land for the purpose of exploration vests in the lessee, and upon oil or gas being found, an interest therein vests in him for the purpose of production. The fact that the instrument contains a provision giving the lessee the right to surrender, release or reconvey the interest thus vested in him does not convert the instrument into an executory one. It so does, no more than a conveyance of the entire title to land is so converted by a provision therein giving the grantee the right to reconvey the land to the grantor. It is just here that confusion exists in dealing with such an instrument. It is frequently stated that the rights of the lessee are inchoate and nothing vests in him until oil or gas is found. This is true to a certain extent, but not entirely. Beyond question his title to the oil and gas in the land is inchoate at the time of the execution of the lease and remains so not only until they are found, but until they are actually produced. And so as to his interest in the land for the purpose of production. It remains inchoate until one of those substances is found. But his interest in the land for the purpose of exploration is never inchoate. It vests immediately upon the delivery of the lease. If the lessee has a vested interest after discovery for the purpose of production, which no one seems to question, what possible reason is there for saying that he does not have a vested interest for the purpose of exploration immediately upon the delivery of the lease."

Regardless of the legal terminology used, the net result of the decisions is the recognition in every oil and gas jurisdiction in the country, with the possible exception of Texas, that under an oil and gas lease, so-called, the lessee acquires a present, vested interest in the land, and that there is nothing more executory about such an instrumnt than there is under any ordinary lease of land.

Closely allied with the question as to the nature and extent of the estate that vests in the lessee upon execution of the instrument is the question as to how far the original consideration of the lease extends, *i. e.*, does it support the entire term of the lease or not? Perhaps I can best explain at what I am driving by calling attention to the form of the usual oil and gas lease. Such an instrument ordinarily purports to create a term for a number of years, say for ten years, in consideration of the payment of an expressed sum, usually some small amount, such as $1.00; this general grant of a long-time term is then followed by a stipulation which carves out of the entire term a shorter term, usually a few months or a year, within which the lessee may at his option drill a well or not without being required to pay anything more. After the expiration of the short term there follows a stipulation, either in an "or" or an "un-

less" form, requiring the payment of stipulated rentals in the event there has been no development of the property. The question presented, therefore, is does the original consideration support the entire term of the the lease, or does it support merely the short term, i. *e.*, the period within which the lessee is given the option to develop without the necessity of paying any rentals? If the latter construction be adopted, it will at once be seen that the door is opened for the contention that there is no consideration to support the lease, except for the period of the short term during which the lessee is given the option of developing or doing nothing; that the remainder of the term, during which the lessee has the option of developing or paying rental, being unsupported by any consideration, is a mere *nudum pactum,* and entitled to be treated as such by the lessor. In short, under such a construction, the lessee acquires only a vested estate for the short term, and he must during that period begin development of the property in order to destroy the lessor's right of revocation. This construction which received the temporary approval of the Oklahoma courts in Brown v. Wilson[17] is clearly fallacious, and unsupported either by authority or reason. In Oklahoma it was very quickly repudiated by the Supreme Court of that state.[18] It has never received the approval of any other court of last resort, so far as I am aware; and it is worthy of note that it has been expressly condemned by the Circuit Court of Appeals for the Sixth Circuit, in an opinion by Mr. Justice Day,[19] and by Judge Cochran in the Eastern District of Kentucky.[20] The reasons given by Judge Day show the fallacy of any attempt to limit the original consideration to any period less than the entire term. His holding summarized is that the instrument is a contract, and as such an indivisible agreement, and that any attempt to so separate the entire term into fractional parts would be doing violence to the instrument as a whole. In passing, it may be worth noting that $1.00 consideration is in the eyes of the law a valuable consideration and sufficient to uphold the entire instrument. This seems to be recognized in all jurisdictions, except in Louisiana, where the rule of the civil law as to the necessity for a substantial consideration applies,[21] and in Texas, where the usual uncertainty seems to exist.[22]

This brings us to the consideration of the question as to which there has been the most confusion and uncertainty in the discussion of oil and gas leases, to-wit, the effect upon the validity of the instrument of the usually inserted clause giving to the lessee the right to surrender and terminate the lease at will, which provision is ordinarily termed "the surrender clause." If in approaching this subject one will bear in mind the two propositions already discussed, *i. e., first,* that upon the execution of the lease there vests in the lessee a present estate in the land, and, *second,* that the original consideration supports the entire lease and all the terms thereof, much of the uncertainty that has surrounded this question will be cleared away.

Until recently I had supposed that the theory that an oil and gas lease was rendered nugatory by the inclusion of a surrender clause had been safely stored away in the mausoleum set aside for dead and departed legal theories and doctrines. But I find that the idea is still abroad in the minds of a few lawyers that at least some vestige of life still breathes in this supposed legal corpse. I am, therefore, going to do what little I can to remove this theory of continued life.

(17) 160 Pac. 94, L. R. A. 1917 B, 1184.

(18) Northwestern Oil & Gas Co. v. Branine, 175 Pac. 533, 3 A. L. R. 344; Rich v. Donaghey, 177 Pac. 86, 3 A. L. R. 352.

(19) Alleghany Oil Co. v. Snydor, 106 Fed. 764.

(20) Lindley v. Raydure, 239 Fed. 928.

(21) Murray v. Barnhart, 117 La. 1023, 42 So. 489.

(22) Compare Owens v. Corsicana Oil Co., 169 S. W. 192, with Pearce-Fordyce Oil Co. v. Woodrun, 188 S. W. 245.

In the first place it can be definitely stated that in the following oil and gas jurisdictions it is held that the inclusion of a surrender clause does not render the instrument invalid: Indiana,[23] West Virginia,[24] Texas,[25] Louisiana,[26] Oklahoma,[27] Ohio,[28] Illinois,[29] Kansas,[30] Arkansas,[31], Alabama[32] and Kentucky,[33] and to which may be added the Supreme Court of the United States.[34] As indicative of the modern trend of judicial thought upon this subject, it is worth noting that in four of the above named states, to-wit, Indiana,[35] West Virginia,[36] Texas[37] and Oklahoma,[38] it was formerly held that the inclusion of a surrender clause was sufficient to render the lease null and void, while in this state there was sufficient uncertainty in the decisions to justify one in expressing some doubt as to just what was the Kentucky rule.

The definite alignment of Kentucky upon the side both of reason and the weight of authority was definitely accomplished by Judge Cochran's decision in Lindley v. Raydure,[39] subsequently affirmed by the Circuit Court of Appeals,[40] and the reaching of a similar conclusion by the Kentucky Court of Appeals in Hughes v. Parsons,[41] and Ohio Valley Oil & Gas Co. v. Irvin Development Company.[42] Since the rendition of these decisions the Court of Appeals has in several cases upheld without question the validity of leases containing surrender clauses.[43] It is obviously impossible in this paper to review the Kentucky decisions rendered prior to Lindley v. Raydure; that they were conflicting and unsatisfactory cannot be questioned, neither can there be any doubt but that there were several utterances which furnished more or less authority for the proposition that a lease containing a surrender clause was void because of lack of mutuality. The clearing away of this uncertainty and the definite alignment of Kentucky upon the side of reason and authority is to no small degree due to the very thorough and exhaustive treatment of the subject in Lindley v. Raydure, in which is to be found a complete review of the prior Kentucky decisions.

I have hereinbefore intimated that the argument that an oil and gas lease was rendered void by the inclusion of a surrender clause, was not only contrary to the weight of authority, but was unsupported by any sound reason. One making such an assertion should be able to prove it. What then are the reasons ordinarily assigned in support of the assaults that have been made upon this clause, and wherein are they wrong?

To sustain the charge of invalidity, there is usually invoked the so-called principle that "contracts unperformed, optional as to one of the parties, are optional as to both." This phrase has been rather neatly char-

(23) New American Oil & Mining Co. v. Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739.

(24) Lowther Oil Co. v. Guffey, 43 S. E. 101; Pyle v. Henderson, 63 S. E. 762; Levett v. Eastern Oil Co., 70 S. E. 707, Ann. Cas. 1912 B, 360.

(25) Corsicanna Pet. Co. v. Owens, 222 S. W. 154; Hunter v. Gulf Pro. Co., 220 S. W. 163; Jackson v. Pure Oil Co., 217 S. W. 959; McEntire v. Thomasson, 210 S. W. 563.

(26) Houssiere Latreille Oil Co. v. Jennings-Heywood Oil Syndicate, 38 So. 932.

(27) Rich v. Donaghey, supra; Northwestern Oil Co. v. Branine, supra; Shaffer v. Marks, supra; Washburn v. Gillespie (C. C. A.), 261 Fed. 41.

(28) Brown v. Fowler, 63 N. E. 76; Central Ohio Nat. Gas Co. v. Eckert, 71 N. E. 281.

(29) Watford Oil & Gas Co. v. Shipman, 84 N. E. 53; Poe v. Ulrey, 84 N. E. 46; Ulrey v. Keith, 86 N. E. 696.

(30) Pittsburg Brick Co. v. Bailey, 90 Pac. 803, 12 L. R. A. (N. S.) 745; Brewster v. Lanyon Zinc Co. (C. C. A.), 140 Fed. 801.

(31) Dunaway v. Galbreath, 214 S. W. 33.

(32) Richard v. Cowley, 80 So. 419.

(33) Lindley v. Raydure (D. C.), 239 Fed. 928, aff'd (C. C. A.) 249 Fed. 675; Hughes v. Parsons, 183 Ky. 584, 209 S. W. 853; Ohio Valley Oil & Gas Co. v. Irvin Dev. Co., 184 Ky. 517, 212 S. W. 110.

(34) Guffey v. Smith, 237 U. S. 101, 59 L. Ed. 856.

(35) Knight v. Indiana Coal & Iron Co., 17 Am. Rep. 692; Federal Oil Co. v. Western Oil Co. (C. C. A.), 112 Fed. 373.

(36) Trees v. Eclipse Oil Co., 34 S. E. 933; Eclipse Oil Co. v. South Penn Oil Co., 34 S. E. 923.

(37) Roberts v. McFadden, 74 S. W. 105; Guffey Pet. Co. v. Oliver, 79 S. W. 884; Witherspoon v. Staley, 156 S. W. 557; Owens v. Corsicana Pet. Co., 169 S. W. 192.

(38) Brown v. Wilson, supra, and decisions therein cited.

(39) 239 Fed. 928.

(40) 249 Fed. 675.

(41) 183 Ky. 584, 209 S. W. 853.

(42) 184 Ky. 517, 212 S. W. 110.

(43) Sugg v. Williams, 229 S. W. 72; Plumber v. Southern Oil Co., 214 S. W. 896.

acterized as a "misleading, though euphonious, epigram." Rightly understood, it has no application to the question under consideration. In an effort to reduce to a formula the general principle intended to be expressed, writers and users of the phrase as quoted have trimmed away some very essential limitations, thereby leaving merely a half-truth. The principle in question applies only to contracts which are *wholly executory* and *unperformed*, the promises on one side being the *sole consideration* for the promises on the other side, and by which it is optional with one of the parties as to whether he will perform his promises. If we go back to our analysis of the nature of the obligations and stipulations contained in the ordinary oil and gas lease, we at once see that such an instrument is not of the character condemned by this legal formula. In the first place, the contract is not wholly executory and unperformed; so far as the lessor is concerned, it is fully performed, in that by the execution of the instrument there was granted by the lessor an estate in the land, to-wit, the right of exploration with the further right to produce when found, which estate vested immediately in the lessee upon the execution and delivery of the instrument. Neither is such an instrument wholly unperformed as to the lessee; as to him it is executed so far as the payment of the original consideration is concerned, which, as we have seen, though usually small, is legally sufficient. It is, of course, true that until actual development the contract is, as to the lessee, partly executory, and that these executory promises, optional as to performance, are part of the entire consideration of the instrument. But a contract, based on an independent consideration, which is wholly performed on one side and partly performed on the other side, is not invalid or unenforceable. That this is true is illustrated by the ordinary option to purchase land, universally upheld when supported by an independent consideration. The true rule governing instruments of this character is well stated in Corpus Juris (Volume 6, page 336) as follows:

"When there is an agreement founded on a consideration, it is not invalid for the want of mutuality because one party has an option while the other has not, or, in other words, because it is obligatory on one and optional with the other. * * * And the option to relinquish a right acquired under a contract will not render it unilateral."

The real cause of the difficulty is the failure to distinguish between mutuality and consideration. Lack of consideration renders the instrument invalid; lack of mutuality does not itself have that result. Where the sole consideration of a contract is a promise against a promise, the performance of which on one side is optional, there is obviously nothing of value to support the obligations on the other side, and therefore the contract falls, not because of lack of mutuality, but because of a lack of any consideration; so if there is an independent consideration paid upon the execution of the instrument, the mere fact that the instrument also contains mutual promises, which as to one of the parties are optional as to performance, does not render the contract invalid. Though lacking as to mutuality, there is no lack of consideration. To quote from Ruling Case Law (Volume 6, page 686):

"Consideration is essential; mutuality of obligation is not, unless the want of mutuality would leave one party without a valid or available consideration for his promise."

And so it will be seen the above quoted "euphonious, but misleading epigram," has no application to the ordinary oil and gas lease, *first*, because such an instrument is not wholly executory or unperformed, and, *secondly*, though it may be lacking in mutuality, it is supported by a consideration independent of the lessees' optional undertakings. This failure to look beneath the surface and the blind acceptance of the truth of a phrase hallowed by frequent repetition is solely responsible for the confusion that formerly existed in our appellate court decisions dealing with this subject. One

might have supposed that the spell of this formula was definitely broken by the decision in Hughes v. Parsons,[44] but it seems that Judge Clay was still partially under its influence when he rendered the opinion in the late case of Daniel Boone Coal Co. v. Miller.[45] I have no quarrel with the conclusion reached in that case, but it would have been better had the contract been condemned because of its real vice, a lack of consideration, instead of a lack of mutuality. A repetition of such language may have the effect of bringing to life a heresy that should be as dead as the belief in witchcraft.

Another formula that has been invoked to sustain this charge of invalidity is that "a tenancy at the will of one party is also at the will of the other." This phrase is responsible for at least two decisions[46] which have done much to encourage attacks based upon the presence of a surrender clause. It might be said that if one was inclined to trace this principle to its source, he would find excellent authority for reaching the conclusion that the "tenancy at will" referred to was a tenancy at the will of the "lessor" and not of the lessee.[47] Regardless of this, however, it is sufficient to the attempted invoking of this formula to call attention to the fact that under the ordinary oil and gas lease there is granted not an estate at will, but an estate for years on limitation, *i. e.*, an estate for a definite term, subject to termination before the end of the term by the lessee's failure to comply with a condition subsequent. Consequently, regardless of its abstract soundness, the principle that "a tenancy at the will of one party is also at the will of the other" has no application herein.

If, in the consideration of the ordinary oil and gas lease, one will just bear in mind what I endeavored to stress at the beginning of this article, that the instrument is not wholly executory and unperformed, that it is supported by a consideration independent of the lessee's covenants, and that under it, immediately upon its execution and delivery, the lessee acquires a present vested estate in the land, then this surrender clause bug-a-boo will at once and forever disappear.

And I trust I will not be thought too presumptuous if I suggest that a little more care in the preparation of such leases is a desirable thing. There has been too much reaching out after form books without regard to the meaning of the forms. The two most essential things in the preparation of these leases are, to word them so that there is an actual grant of the land for the limited purposes of exploration and production, and to provide for an independent consideration. If the lawyers does this, he has done his part, and it is then up to the operator to find the oil or pay the rentals.

The Act of March 18, 1920, Chapter 24, Acts 1920, has brought to a head in this state a question as to which there has been some little contrariety of opinion. By the first section of that Act it is, in effect, provided that whenever in any oil or gas lease there is a provision that actual development of the property may be postponed by the payment of rentals, the failure to pay such rentals when due shall, regardless of the terms of the lease, render same null and void. Obviously this statute can have no effect upon leases executed prior to its enactment, for to hold otherwise would bring the statute within the constitutional prohibition against the impairment of contract obligations. That such is the case seems to have been assumed by the Court of Appeals.[48] This brings us directly to a consideration of what was the rule, prior to the enactment of this statute, as to the effect of the failure to pay rentals. So far as concerns the payment of rentals in lieu of development, leases may be divided into

(44) 183 Ky. 584, 209 S. W. 853.

(45) 186 Ky. 561, 217 S. W. 666.

(46) Knight v. Indiana Coal & Iron Co., 17 Am. Rep. 692; Tennessee Oil Co. v. Brown (C. C. A.) 131 Fed. 696.

(47) Blackstone, Vol. 1, Book 2, page 144 (Sherwood's Ed.); Kent (6th Ed.), Vol. 4, p. 110.

(48) Sugg v. Williams, 229 S. W. 72; Hunt v. Garvin, 227 S. W. 811.

two general classes, commonly referred to as "or" and "unless" leases. The usual form of the "or" lease is that the lessee shall within a specified period drill a well *"or"* thereafter pay the stipulated rentals; the "unless" lease generally provides that in the event of the failure upon the part of the lessee to drill within the specified period, the lease shall become null and void "unless" the lessee thereafter pays the rentals as provided for. In short, the "unless" lease expressly provides that the failure to pay the rentals shall terminate the lease, whereas the "or" lease does not in terms make such failure a ground of forfeiture. In the "unless" lease the lessee is given the option of either developing or paying, with the proviso that a failure to do either shall cause a forfeiture; in the "or" lease the undertaking to do one or the other, *i. e.*, to drill or pay, is absolute. Of course, under the provisions of an "unless" lease, where there has been no development, a failure to pay will cause a forfeiture, for the lease expressly so provides. But will a similar effect be given to such failure under the provisions of an "or" lease? In short, under such a lease will the courts imply a forfeiture clause for a failure by the lessee to either develop or pay the delay rentals? There is undoubtedly authority for the position that as regards a failure to pay rentals in lieu of development, there is no difference between the two classes of lease, and that such a failure will result in a forfeiture, regardless of whether the lease is an "or" or an "unless" stipulation.[49] In fact, in one recent Kentucky decision[50] language is used which might indicate that such was the Kentucky rule. However, in a subsequent case it was directly held that under an "or" lease a delay in the payment of rentals would not result in a forfeiture, the court holding that a forfeiture clause would not be implied.[51] Such is undoubtedly the better ruling. To hold otherwise is to write into the instrument something that the parties have not expressed; it is also in keeping with the weight of authority,[52] and has received the approval of the Federal court for the Eastern District of Kentucky[53] and the implied approval of the Circuit Court of Appeals for this circuit.[54] I would not be understood to imply that an intentional and continued failure to pay the delay rentals would not terminate even an "or" lease; but in such case the termination results from abandonment, and not by reason of a forfeiture. The distinction is clearly pointed out in a West Virginia case, as follows:[55]

"Abandonment * * * rests upon the intention of the lessee to relinquish the premises, and is therefore a question of fact for the jury, while a forfeiture does not rest upon an intent to release the premises, but is an enforced release."

I think, therefore, that we may safely say that in this jurisdiction at least, an "or" lease executed prior to the passage of the Act of March 18, 1920, is not forfeited by a failure or delay in the payment of the rental stipulated for in lieu of development.

While speaking of this Act of March 18, 1920, it should be noted that it makes one important change in the law of this state. Our Court of Appeals by judicial legislation has written into an oil and gas lease an implied provision that the lessee may require development of the leased property, notwithstanding the lease expressly stipulated that the lessee shall have the option to *either* develop or pay rent, and that failure to develop after the giving of a reasonable notice by the lessor will authorize a forfeiture.[56] This doctrine is ex-

(49) Brown v. Wilson, supra.

(50) Denniston v. Kenova Oil Co., 187 Ky. 831, 220 S. W. 1078.

(51) Kies v. Williams, 228 S. W. 40.

(52) Northwestern Oil & Gas Co. v. Branine, supra; Reserve Gas Co. v. Carbon Black Mfg. Co. (W. Va.), 79 S. E. 1002; Marshall v. Forest Oil Co. (Pa.), 47 Atl. 927; Davis v. Chautauqua Oil & Gas Co. (Kan.), 96 Pac. 47; Guffey v. Smith, 237 U. S. 101; and authorities cited in dissenting opinion, Brown v. Wilson, L. R. A. 1917 B, page 1203.

(53) See unreported opinion of Judge Cochran in Zeigler v. Hopkins, and Little Paint Oil & Gas Co. v. Armstrong, decided April 29, 1921.

(54) Hopkins v. Zeigler, 259 Fed. 43.

(55) Garrett v. South Penn Oil Co., 66 S. E. 745; see also Smith v. Root (W. Va.), 30 L. R. A. (N. S.) 176, and Marshall v. Forest Oil Co., supra.

pressly abolished by the second section of the Act referred to, and under oil and gas leases executed subsequent to the passage of the Act, which contain a provision for the payment of rentals in lieu of development, a lessee cannot be compelled to develop the property.

In conclusion, I want to call attention to a practical difficuly with which I have had to deal on one or two occasions, which is very likely to arise wherever there is oil and gas development. The situation may be stated as follows: I own a tract of 100 acres and give an oil and gas lease thereon; thereafter I divide this tract, conveying one-half to "A" and one-half to "B," transferring to them my reserved royalty interest. Subsequently the lessee enters on "A's" tract and strikes a paying well. In such case is "A" entitled to the entire royalty or must the royalty be divided between "A" and "B" on an acreage basis. I have taken the latter position upon the theory that so far as the lease is concerned, the two tracts are to be treated as an entirety, and because if any other conclusion is reached, the lessee by drilling on "A's" tract only could draw all the oil from under "B's" tract, and thus deprive him of all the benefits of the lease. I think the conclusion reached is supported by the reasoning contained in the line of cases dealing with a somewhat analogous situation, to be found in the West Virginia decision of Lynch v. Davis.[57]

In closing, I want to say I feel a good deal like a plagiarist, but perhaps I can ease my conscience somewhat by acknowledging that the views herein expressed are to a considerable extent prompted by Judge Cochran's opinion in Lindley v. Raydure. No discussion of this subject would be complete without an acknowledgment of the effect of that decision upon the clearing up of several perplexing uncertainties in the construction of oil and gas leases.

LE WRIGHT BROWNING.

Maysville, Ky.

(56) Monarch Oil & Gas Co. v. Richardson, 124 Ky. 604; Warren Oil & Gas Co. v. Gilliam, 182 Ky. 807.

(57) L. R. A. 1917 D, page 115.

FRAUD — MISREPRESENTATIONS AS TO POWER OF MOTOR.

MAXWELL ICE CO. v. BRACKETT, SHAW & LUNT CO.

116 Atl. 34.

Supreme Court of New Hampshire. Dec. 6, 1921.

Representations by an expert on power to one not having equal knowledge as to the amount of energy which standard makes of motors and engines will develop are not future promises, but are statements as to known facts based on tests and mathematical computations, and differ materially from "sellers' talk" or mere opinions expressed to one having equal knowledge or equal opportunities for knowledge.

Action by the Maxwell Ice Company against the Brackett, Shaw & Lunt Company. Motions for a non-suit and for directed verdict were denied, and defendant brings exceptions. Transferred, and exceptions overruled.

The plaintiff signed the following order:

"To Brackett, Shaw & Lunt Co., of Somersworth, N. H.: You will please ship by freight to Manchester, N. H., to be delivered f. o. b. cars factory about the 7th day of May, 1918, one of your 45 H.P. Davis engines, sawmill pattern. I am to have benefit of car rate of freight from factory to Somersworth. You are to allow exchange for 10 ds. for a 65 H.P. I to have full allowance if I do not damage engine beyond usual wear. In case of exchge. I am to pay all freight costs on both engines. * * * For which I agree to pay $1,475.00 as follows: At the time of delivery, cash, $400.00. * * *"

The further material facts appear in the opinion.

Arthur S. Healy, of Manchester, for plaintiff.

Taggart, Tuttle, Wyman & Starr and L. E. Wyman, all of Manchester, for defendant.

SNOW, J. The plaintiff was engaged in sawing oak and pine timber at Amoskeag with a portable sawmill propelled by a 35 horsepower (so-called) electric motor. He was under contract to saw pine timber upon a lot at Goffstown, where electric power was not available. He therefore entered into negotiations with the defendant for the purchase of a kerosene engine to supply power in the place of his electric motor. The evi-

dence tended to prove that he explained to the defendant's agent "thoroughly" and "fully" the uses for which he wanted the engine; that he stated to the agent that he thought he ought to have an engine of 65 horse power to operate his mill; that the agent thereupon told him that the defendant company had a 45 horse power Davis engine that would be "suitable" to his wants, "meet every requirement," "do just as good work as the electric motor," and do the work "just as well," and that the plaintiff "did not need" a 65 horse power engine. At the same conference, but after the order was signed, the agent was taken to the mill and shown the electric motor and a blower not driven by the same motor.

The plaintiff first attempted to operate his sawmill at Amoskeag with the 45 horse power engine and after some difficulty, with the aid of a man sent out by defendant at plaintiff's request, he "got it to going" and tried the mill out on some oak logs, but it did not work very well. From this trial the plaintiff "did not think" that the engine would do the work, but, as the oak logs were "hard sawing" and he "wanted to give it a chance on pine," he removed the engine with his mill to Goffstown, where, upon trial, the engine continued to show such lack of power that the "mill would stop in the middle of a log" and produce only about 50 per cent. of the daily cut usual for such a mill. The defendant sent to Goffstown its representative, who conceded that the engine did not have sufficient power to run plaintiff's mill, although it tested 45 horse power. Thereupon the plaintiff requested the defendant to exchange the engine for a larger one, and a 65 horse power engine was substituted 9 or 10 days later, during which time the mill was shut down. This engine ran the mill.

The defendant in its brief and argument contends: (1) That there is no evidence that defendant's agent knew the true facts or that he had reason to believe that his representations were false; (2) that the alleged misrepresentations were nonactionable promises; (3) that the evidence conclusively shows that the plaintiff did not rely on defendant's representations; (4) that there was conclusive evidence of plaintiff's contributory negligence; and (5) that the plaintiff waived his right of action, if any, by availing himself of the right to exchange engines under the provisions of the order.

1. The defendant had been in business five years or more, was the agent for the sale of the Davis kerosene engine, and dealt more or less in electric motors. The defendant's agent qualified as an expert witness on power. He testified that the leading makers of electric motors rated their motors to "develop a constant load of 25 per cent. over load, and a temporary load of 40 to 50 per cent. over load," and that the plaintiff's motor would develop possibly 40 per cent. or "nearer 15 horse power" more than its rated capacity. It does not appear that plaintiff had this technical knowledge. It could be found from the foregoing that the defendant's agent knew or had reason to believe that the plaintiff's motor, although rated as 35 horse power, in fact developed 49 to 52 horse power temporary over load; that he nevertheless represented to plaintiff that the Davis engine which tested only 45 horse power would be suitable to his wants, meet every requirement, and "do just as good work" as the plaintiff's motor. It could be further found that the margin of 4 to 7 horse power between the relative capacities of the motor and the engine accounted for the insufficiency of the latter to operate the mill. While the defendant's agent at the trial declined to qualify as an expert on "sawmills," it does not appear that he advised the plaintiff of this limitation of his knowledge when he assumed to assert the sufficiency of the engine to operate the mill. It is the duty of one who volunteers information to another not having equal knowledge, with the intention that he will act upon it, to exercise reasonable care to verify the truth of his statements before making them. See 14 Harv. Law Rev. 189, 190, 197.

"A positive statement * * * not only includes a representation that the fact is as stated, but also the further representation that the maker knows it to be so." Spead v. Tomlinson, 73 N. H. 46, 61, 59 Atl. 376, 380 (68 L. R. A. 432).

It could be found from the foregoing that the agent's statement constituted representations of material facts which he either knew or ought to have known were false. In this state a person who acts upon a false representation made for the purpose of inducing him to change his position may recover the damages he sustains in an action of negligence when the maker of the statement ought to have known it to be false. Cunningham v. C. R. Pease House Furnishing Co., 74 N. H. 435, 437, 69 Atl. 120, 20 L. R. A. (N. S.) 236, 124 Am. St. Rep. 979; Shackett v. Bickford, 74 N. H. 57, 60, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933.

The fact that the agent did not see the electric motor and the manner in which it was hitched up to the mill, with the blower

driven by another motor, until after the order was signed, does not relieve the defendant. Plaintiff's writ counts, not on a breach of the contract, but upon negligence. If, having reason to believe that the representations he had already made were untrue, and knowing that the plaintiff intended to act on them, the agent negligently allowed his misrepresentations to stand, his silence became as operative and misleading as a positive statement or act would have been, and, when such is the case, a jury would be warranted in finding that the silent conduct had ceased being passive and had become an active misrepresentation. Conway Bank v. Pease, 76 N. H. 319, 326, 328, 335, 82 Atl. 1068. In negligently allowing his misrepresentations to stand, the defendant's agent violated his legal duty none the less clearly because the plaintiff had already affixed his signature to the order for the engine.

2. Representations by an expert on power to one not having equal knowledge as to the amount of energy which standard makes of motors and engines will develop are not future promises, but are statements with reference to known facts based on tests and mathematical computations. Such representations differ materially from "sellers' talk" or mere opinions expressed to one having equal knowledge or equal opportunities for knowledge.

In "the case of an expert stating to a non-expert his opinion on matters requiring peculiar skill or knowledge, * * * it is difficult to see why a plaintiff who acts reasonably in relying on the statement may not recover against one who negligently volunteers an erroneous 'opinion' intending the plaintiff to act upon it, and knowing that substantial loss is likely to follow if the 'opinion' proves incorrect. * * * Negligent misstatement exists just the same whether it be due to carelessness in forming a belief or to carelessness in the mode of expressing one's belief." 14 Harv. Law Rev. 197, 198.

3. It is true that there was evidence of other inducements besides the representation in question, such as the lesser cost of the smaller engine, its lightness for moving, and possibly a quicker delivery, as the defendant had these engines in stock while the larger engine was only in transit. So, too, the contractual right for 10 days to exchange the lighter for the heavier engine, with loss only of the extra freight charge and delay incident to the exchange, was an inducement. But it was not necessary that the agent's false representation as to the efficiency of the engine should have been the sole inducement to the contract. Braley v. Powers, 92 Me. 203, 42 Atl. 362, 364; Safford v. Grout, 120 Mass. 20, 25; Light v. Jacobs, 183 Mass. 206, 66 N. E. 799, 800; Sleeper v. Smith, 77 N. H. 337, 339, 91 Atl. 866; Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 40 Atl. 1046, 1050, 1051; Handy v. Waldron, 19 R. I. 618, 35 Atl. 884; Kley v. Healy, 127 N. Y. 555, 28 N. E. 593, 595; Ochs v. Woods, 221 N. Y. 335, 117 N. E. 305, 306; Strong v. Strong, 102 N. Y. 69, 5 N. E. 799, 801. If the plaintiff would not have entered into the contract but for such representation, it was the proximate cause of his loss as the term is used in the law of torts. The fact that there were other contributing causes not due to plaintiff's own negligence is not a defense. Miner v. Franklin, 78 N. H. 240, 241, 99 Atl. 647. The plaintiff testified that he relied "absolutely" on the agent's statement and that otherwise he "would not have taken the engine at all." This evidence is corroborated by his continued efforts at Amoskeag and at Goffstown to try out the engine. All inducements to the contract, including the defendant's negligent representation as to the sufficiency of the 45 horse power engine to run plaintiff's mill, were competent evidence bearing upon the issue whether the plaintiff relied upon the latter, but no one or more of them is conclusive.

"The weight and reliability of competent evidence is to be determined exclusively by the jury." Hewett v. Association, 73 N. H. 556, 567, 64 Atl. 190, 193 (7 L. R. A. [N. S.] 496); Hubbard v. Leighton, 79 N. H. 190, 191, 106 Atl. 485.

It could be found that a man of average prudence would have relied upon the representations of an expert on power as to what an engine would accomplish when its proposed uses had been "thoroughly" and "fully" explained, and when, before the plaintiff was left to act upon the representations, the expert had examined the mill and the manner in which it was hitched up to its motive powers.

4. But the defendant contends that the plaintiff was guilty of negligence in his failure to notify the defendant, after the trial of the engine at Amoskeag, that "he did not think it would do the work," and that he claimed misrepresentation; that the plaintiff had no right to take the engine to Goffstown at the risk of the defendant, relying upon representations which he then believed to be untrue.

"If a misrepresentation is negligently made, or negligently allowed to stand, the party injured by relying upon it must show that he acted as a reasonably prudent man in so doing." Conway Bank v. Pease, supra, 76 N. H. 328, 82 Atl. 1073.

Was there evidence from which it could be found that the plaintiff acted with reason-

able prudence in his continued reliance upon the defendant's representations? The engine was tried out at Amoskeag on oak logs. The plaintiff testified that the oak logs "were hard sawing," and that he "wanted to give it [the engine] a chance on pine;" that sawing oak was a "different proposition;" that it "took longer to saw oak than it did pine." Plaintiff had the engine on his hands. It had not been tried out in the sawing of pine upon which alone the representations had been based. Was he careless in giving it such a trial because from his experience with oak he "did not think" that it would do the work with pine? Entertaining a belief upon insufficient evidence is not necessarily equivalent to being convinced.

"Between mere belief and knowledge there is a wide difference." Iron Silver Mining Co. v. Reynolds. 124 U. S. 374, 384, 8 Sup. Ct. 598, 603, 31 L Ed. 466, 471.

Belief "may be a passive condition of the mind prompting in neither action nor declaration." Grube v. Wells. 34 Iowa 148, 151.

"Belief admits of all degrees, from the slightest suspicion to full assurance." Webster's Inter. Dic.; Shumaker & Longsdorf Cyc. Dic.

See, also, Allen's Synonyms and Antonyms; Hatch v. Carpenter, 9 Gray (Mass.) 271, 274. Whether plaintiff's belief as to the probable result of a further trial of the engine under the conditions contemplated in defendant's representations had become a mental state, having which a man of ordinary prudence would have ceased further trial, was a question of fact. At just what stage of experimentation a mental state of reliance becomes one of nonreliance cannot be fixed by a rule of law. In other words, plaintiff's belief, based upon an unsatisfactory trial under adverse conditions, was not conclusive evidence either that he had ceased to rely on defendant's assurances or that he was negligent in trying further to verify them. Plaintiff's persistence in continuing the trial of the engine at the hazard of delay in his own work may as well be attributed to the abiding strength of the impression which the representations of an expert or power had made upon his mind as to a negligent disregard of the consequences to the defendant.

"Unless the carelessness of the plaintiff was so apparent that all fair-minded and reasonable men must agree that he was negligent, the case was properly submitted to the jury." Blood v. New Boston, 77 N. H. 464, 465, 92 Atl. 954, 955; Bourassa v. Railway, 75 N. H. 359, 360 74 Atl. 590; Miner v. Franklin, supra.

5. Counsel claims that, when the plaintiff signed the contract which provided for a right of exchange, he thereby agreed with the defendant as to what the remedy should be if the engine did not do the work. This is not a necessary inference. By the terms of the contract the right to exchange engines is not predicated upon the inability of the engine to yield the power represented, but appears to be absolute. The right might be exercised by the plaintiff for any reason, such as a desire to enlarge his mill by the installation of additional machinery, or, for that matter, from mere whim or caprice. Therefore, to sustain defendant's contention as to the construction of the contract, it must conclusively appear from a consideration of all the competent evidence that the parties intended the contractual right of exchange not only to safeguard the plaintiff from losses, if any, arising by reason of the failure of the engine to come up to expectations based upon defendant's nonactionable commendations, but as a remedy for any damages which the plaintiff might suffer from defendant's negligent misrepresentations of fact. A mere statement of the question is an answer to it, since it cannot be assumed that the parties mutually contemplated and provided a remedy for actionable misrepresentations.

But the defendant contends that the exercise of the contractual right to exchange engines with a full knowledge of the incapacity of the 45 horse power engine was a waiver as to the manner in which the contract had been obtained. If plaintiff was induced by the defendant's negligent misrepresentations to make an expensive experiment which he would not otherwise have made, the acceptance of the partial relief afforded by the exercise of his rights under his contract did not absolve the defendant from liability. It was the duty of the plaintiff to do what he reasonably could to avoid the effect of defendant's negligence.

Exceptions overruled.

NOTE—*Representations as to Power of Motors as Express Warranties.*—A statement by the seller that a motor truck will carry three tons is a warranty, if relied on by the buyer. Hackett v. Lewis, Cal. App., 173 Pac. 111.

False statements by the seller of an automobile that it has a certain capacity, and is as good as a car of a certain make, are material misrepresentations of fact and binding on the seller. Checkley v. Joseph Lay Co., 171 Ill. App. 252.

A representation that an electric automobile would run a distance of 50 miles on a single charge of its batteries, when it would not run to exceed 30 miles on a charge, was a warranty. Jones v. Magoon, 119 Minn. 434, 138 N. W. 686.

A statement that the automobile in question would do whatever any other automobile of the same kind and make would do, was an express warranty. Summers v. Provo F. & M. Co., Utah, 178 Pac. 916.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Automobiles**—Contributory Negligence.—Pedestrian struck, while crossing street, by defendant's automobile, which she did not see until within five feet from her, held not entitled to damages, since, if defendant was negligent in not discovering plaintiff until within a few feet from plaintiff, the plaintiff was also guilty in not sooner discovering defendant's automobile.—Brickell v. Trecker, Wis., 186 N. W. 593.

2.——Negligence.—Negligence of driver of automobile held not imputable to gratuitous passenger.—Chase v. American Cartage Co., Wis., 186 N. W. 598.

3.——Negligence.—For motor vehicle to run down a pedestrian who is in full view, and does not suddenly change his course, is evidence of negligence.—Rankin v. Ward Baking Co., Pa., 116 Atl. 58.

4.——Negligence.—A pedestrian, carrying a box of raisins, run down and killed at a street intersection by an automobile in the nighttime, with proper lights, while going at a speed of 15 miles an hour, was negligent, since he either failed to look for automobiles, or saw the automobile and carelessly walked in front of it, or carried the box of raisins so that it obscured his vision.—Finkle v. Tait, Cal., 203 Pac. 1031.

5. **Bailment**—Delivery.—Whether voluntary bailments be for hire or coupled with an interest on the part of the bailee, or merely gratuitous, it is the duty of the bailee to deliver the bailed article to the right person, and delivery to a wrong person is not excused by any showing of care or good faith.—Cowen v. Pressprich, N. Y., 192 N. Y. S. 242.

6, **Bankruptcy**—Good Faith.—While a purchase of goods on credit by a person who knows that he is insolvent and will not be able to pay for them, or who is in fact insolvent, but voluntarily refuses to ascertain his condition, is an essentially fraudulent transaction, and entitles the seller to reclaim his goods, a purchase by a mercantile corporation, whose managing officer, while knowing the precarious condition of its affairs, believed with some reason that they could be adjusted, so that it would continue in business, and who acted in good faith in making the purchase, lacks the elements of actual fraud which entitles the seller to reclaim the goods from its trustee in bankruptcy.—In re Empire Grocery Co., U. S. D. C., 277 Fed. 73.

7.——Jurisdiction.—The jurisdiction of a state court in a suit is at once superseded by an adjudication in bankruptcy against the defendant therein, and it is without authority to proceed thereafter; but, where it does so, its judgment against the bankruptcy may be accepted by the bankruptcy court as a liquidation of the plaintiff's claim, under Bankruptcy Act, § 63b.—In re Ellsworth, U. S. D. C., 277 Fed. 128.

8.——Proof of Claim.—An objection to claims presented against a bankrupt's estate, that there was no proof of the validity or consideration for the claims, or of their being proper, under the laws of the state, does not include the statute of limitations as a plea in bar.—In re Weidenfeld, U. S. C. C. A., 277 Fed. 59.

9. **Banks and Banking**—Certified Check.—A certified check, the indorsement of which is forged, cannot be enforced.—Eagan v. Garfield Nat. Bank, N. Y., 192 N. Y. S. 209.

10.——Receivership.—Chapter 134, Laws 1921, which provides that the Attorney General, upon a report and opinion of the bank examiner, shall institute proper proceedings "for the purpose of having the bank examiner appointed as receiver" of an insolvent bank, does not make it compulsory on the district judge to whom the application is made to appoint said bank examiner as said receiver, but the judge has discretion in the matter and may appoint another as receiver.—Attorney General v. Ryan, N. M., 204 Pac. 68.

11. **Benefit Societies**—Mode of Procedure.—The right to a particular mode of procedure for the trial of charges against the member of a fraternal benefit society is not a vested right in the member.—Schulz v. Supreme Tent, Knights of Maccabees of the World, Mo., 236 S. W. 903.

12. **Bills and Notes**—Condition Precedent.—Where a promissory note is executed by a person ostensibly as the principal, and is delivered to the authorized agent of the payee, but not as a final and complete obligation between the parties, and where, under the facts of the case, the person executing it is a surety only for the debt of another, and the instrument, under an agreement between the parties to the transaction, is not to become a binding obligation until the signature of such principal debtor has been procured, it does not, in the absence of the signature of the latter, become a binding and valid obligation between the original parties. In so far as the defendant's plea set up

such defense it was erroneously stricken.—Butler v. Citizens' Bank, Ga., 110 S. E. 501.

13. **Brokers**—Commission.—Where lease for baseball purposes to persons, procured by brokers having nonexclusive right to procure lease, was not consummated for lack of financial ability of lessees, and where owner, being assured that land was not wanted for baseball purposes, in good faith gave option for lease to other person not known to have any connection with persons procured by brokers, and who was thought by owner to have wanted land for manufacturing purposes, the owner on execution of lease to assignee of person to whom option had been given was not liable for commission notwithstanding information from brokers after execution of option and before execution of lease as to connection between assignee and such persons and as to prospective use of land for baseball purposes.—Ballard v. Archambault, Wis., 186 N. W. 622.

14.——Offer of Purchase.—A broker's letter to owner of land, stating that he had a purchaser ready, able, and willing to buy the land on terms specified, when deposited in the post office addressed to the owner, was a notice to the owner binding on him, from the time it was deposited in the mail, if within the time specified for finding a purchaser.—Lingquist v. Loble, Mont., 204 Pac. 170.

15. **Carriers of Live Stock**—Delay.—A shipper did not waive right to damages for delay in furnishing a stock car after notice by a provision of a subsequent contract providing that all prior contracts, and understandings, as to the receipt or transportation of stock or the furnishing of cars therefor are waived by the shipper and merged in the agreement; the right to damages for the delay being based on the carrier's violation of its common-law duty, and not on breach of contract.—Howell v. Hines, Mo., 236 S. W. 886.

16. **Carriers of Passengers**—Jitney.—Operator of jitney bus, under St. 1919, §§ 1797—62 to 1797—68, was a common carrier and was required to exercise toward passenger the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the character of the conveyance and consistent with the practical operation of the business, but was not charged with the necessity of either possessing superhuman powers of anticipation or exercising such powers in a threatened emergency.—McCaffrey v. Automobile Liability Co., Wis., 186 N. W. 585.

17.—Negligence.—In an action for injuries to plaintiff's son intending to board defendant's street car which ran over him when he fell or slipped under the side after the front had passed, negligence of the motorman in failing to keep a lookout held not to have contributed to the injury, so as to make defendant liable.—Vosbein v. New Orleans Ry. & Light Co., La., 90 So. 579.

18. **Commerce**—Discrimination.—An action lies under Rev. St. 1919, § 9985, for damages for discrimination in furnishing cars for the shipment of lumber which could have gone over either an intrastate or interstate route.—Stroud v. Missouri Pac. R. Co., Mo., 236 S. W. 891.

19.——Interstate.—An employe, who is engaged in repairing a car or other instrumentality of a carrier engaged in both interstate and intrastate commerce, and which car has been in the past used in either commerce and may be in the future used for either, is not employed in interstate commerce within the federal Employers' Liability Act.—Utah Rapid Transit Co. v. Industrial Commission, Utah, 204 Pac. 86.

20.——Interstate.—A railroad employee sent from one town to another to make repairs on cars being used in interstate commerce was engaged in "interstate commerce" on his way back, when he was killed by a train engaged in purely intrastate business.—Richter v. Chicago, M. & St. P. Ry. Co., Wis., 186 N. W. 616.

21.——Original Package.—A tank steamer and oil which is being brought from a foreign country, together, constitute the "original package," and the oil ceases to be an import and is taxable by the state after it has been placed in tanks on shore, where it is to remain until sold and shipped to purchasers, notwithstanding Const. U. S. art. 1, § 10, prohibiting state from levying imposts or duties on imports or exports.—Mexican Petroleum Corporation v. City of South Portland, Me., 115 Atl. 900.

22. **Constitutional Law**—Due Process.—Special assessments may equal, but must not exceed, the benefit to the property taxed. The excess in the cost of a local improvement beyond the actual benefits which the property assessed receives cannot be charged against that property without taking from the owner a portion of his property without due process of law and without just compensation.—Futscher v. City of Rulo, Neb., 186 N. W. 536.

23. **Contracts**—Rescission.—That one of the parties to the written contract executed it by appending his signature thereto when in a hurry to attend to other business and without reading the instrument which he signed, and that he executed the instrument relying upon an alleged false representation made to him by the other contracting party that it contained the true agreement, is insufficient to establish the contention that he was fraudulently induced to sign the contract.—Rawlings v. Fields, Ga., 110 S. E. 499.

24. **Corporations**—Admissions by Officer.—Admissions made by the officer or agent of a private corporation, relative to any matter over which he has control or authority to decide and act upon, is binding upon the corporation.—Dirks v. Ensign Omnibus & Transfer Co., Neb., 186 N. W. 525.

25.——Authority of Officers.—Where the controlling stockholders and officers of a corporation knew for a long time that secretary and treasurer was misappropriating and handling the funds in a reckless and illegal manner, and was drawing checks in his own favor and depositing them in a bank to his own credit, the corporation is estopped to deny authority of such officer to draw such checks and deposit the same to his own credit in an action against the bank.—Napoleon Hill Cotton Co. v. Franklin Bank, Mo., 236 S. W. 910.

26.——Exchange of Stock.—Stockholders of a new corporation who bought stock of nonassenting stockholders of old corporation held not entitled to reimbursement from another stockholder.—Warner v. Powers, N. Y. 192 N. Y. S. 141.

27.——Mortgage.—Book accounts of a corporation at its insolvency are subject to a mortgage on its property then owned or thereafter acquired.—Gerard Trust Co. v. Standard Gas Co., N. J. 115 Atl. 910.

28.——Sale of Stock.—A purchaser of stock is not deprived of his right to damages for the corporation's delay in delivering certificates therefor by the fact that the purchaser was able to supply his own customers out of other stock that he had on hand, the corporation knowing that the purchase was made for the purpose of resale.—Rock v. Gustaveson Oil Co., Utah, 204 Pac. 96.

29.——Service of Process.—Where foreign corporation did no business in the state, and had no property therein, and where the president while temporarily present in the state transacted no business for the corporation, the service of process on the president during such temporary presence was insufficient to give the court jurisdiction against such corporation.—Zurich General Acc. & L. Ins. Co. v. Imperial Weel Co., U. S. D. C., 277 Fed. 71.

30.——Service of Process.—To warrant a finding that a foreign corporation was doing business in the state, so as to authorize service on an officer, regardless of whether ne was in the state on its business at the time, the evidence must show the corporation was in the state, not occasionally or casually, but with a fair measure of permanence and continuity.—Seaboard Fruit Distributors v. Carlton-Moore Co., N. Y., 192 N. Y. S. 82.

31. **Electricity** — Rates. — Where proceeding before Public Utilities Commission, involving issue as to whether rates at which power company was furnishing power to particular consumer was discriminatory, in violation of Comp. Laws 1917, § 4789, was held concurrently with proceeding on power company's application to increase its rates, the Commission properly refused in the first proceeding, to pass upon the reasonableness of the rates sought to be charged by the power company, or to pass upon the reasonableness of the rates being charged by the company according to its regular schedule, at which the company was ordered to supply power to consumer to whom power had previously been furnished at discriminatory rate.—Utah Copper Co. v. Public Utilities Commission of Utah, Utah, 203 Pac. 627.

32. **Eminent Domain**—Public Use.—The mere fact that some selfish interest may have inspired the plan for the construction of a section of railroad does not in itself prevent such section from being classed as a branch road or as a section for public use, within rule requiring it to be devoted to public use to authorize the railroad to condemn land therefor.—Pioneer Coal Co. v. Cherrytree & Dixonville R. Co., Pa., 116 Atl. 45.

33. **Fixtures**—Intent.—Where structures are erected on land by a licensee, consent on the part of the landowner that the structures remain the property of the licensee will be implied, in the absence of facts showing a different intention.—Gosliner v. Briones, Cal., 204 Pac. 19.

34.——Mistake in Land.—A barn and foundation for a house constructed upon the lot of another by mistake could not be removed without the consent of the owner of such lot.—Lee v. Bielefeld, Wis., 186 N. W. 587.

35. **Fraudulent Conveyances** — Possession.—Where owner of personal property organized a corporation, was elected its president, and made no change whatever in the control of an automobile, which he claimed to have sold to the corporation, and made no transfer in the office of the state automobile department, he could not claim that his possession became that of the corporation in view of Civ. Code, § 3440, relating to transfers.—Joseph Hersprng Co. v. Jones, Cal., 203 Pac. 1038.

36. **Hospitals** — Liability. — A hospital conducted for private gain is liable to its patient for injuries sustained by him in consequence of incompetency or negligence of a physician treating him at its instance, under a contract binding it to furnish him proper treatment.—Jenkins v. Charleston General Hospital & Training School, W. Va., 110 S. E. 560.

37. **Husband and Wife**—Voidable Marriage.—In a criminal prosecution of a husband and father upon a charge of unlawful desertion of his wife and unlawfully withholding from her and their child the means of support, evidence that the marriage of the parties was procured by fraud and effected as a result of coercion is incompetent and inadmissible, since it tends to prove that such marriage was voidable only.—Tyson v. State, Fla., 90 So. 622.

38. **Injunction** — Picketing. — Picketing by a great number of pickets during a strike held subject to injunction on the ground of intimidation of those that desired to become employees, although no acts of violence were committed.—Keuffel & Esser v. International Association of Machinists, N. J., 116 Atl. 9.

39. **Insurance** — Attorney's Fee. — Section 4263, Revised General Statutes, which provides for the payment of attorney's fees to the plaintiff by an insurance company or association which unsuccessfully defends an action upon a policy of insurance issued by it, is valid as an appropriate police regulation of a business affected with a public interest.—United States Fire Ins. Co. v. Dickerson, Fla., 90 So. 613.

40.——Inflammable Product.—Where policy on stock, equipment, etc., of a paint manufacturer's establishment forbid keeping naphtha or products of petroleum more inflammable than kerosene, insurer could not escape being charged with knowledge that naphtha was a customary and necessary ingredient of insured's product by the introduction of evidence of use of "heavy" naphtha in the manufacture of paints of less inflammability than ordinary "light" or "straight" naphtha, where the evidence also showed that all such naphtha was of greater degree of inflammability than kerosene.—Rabok Mfg. Co. v. Scottish Union & National Ins. Co., Mo., 236 S. W. 918.

41.——Minor Employe.—Where an insurance policy, indemnifying the plaintiff against loss for personal injuries caused by its elevator, expressly provided that the "policy does not cover on account of injuries or death caused by any elevator while in charge of any person under the age fixed by law, ordinance, or municipal regulation for elevator attendants, or under the age of 16 years, where no age is so fixed," there can be no recovery against the insurer on a judgment recovered against the plaintiff for personal injuries where it appears that the elevator attendant was under 16 years of age, and did not possess a work permit provided for, under chapter 17, Acts 1919.—Walker Dry Goods Co. v. Massachusetts Bonding & Ins. Co., W. Va., 110 S. E. 553.

42. **Intoxicating Liquors** — Beverage. — In a prosecution for being a common seller of intoxicating liquors, the court properly refused defendant's instruction that cider sold for tippling purposes or as a beverage means cider sold by one who knows or ought to know that it is to be drunk as a beverage; proof of a sale regardless of intent, being sufficient under the statute.—State v. Douglass, Me., 116 Atl. 28.

43. **Landlord and Tenant**—Implied Warranty. —A lease of a furnished dwelling house for eight months from the beginning of the summer season at a summer resort held within the rule of implied warranty that such a house leased for a short time and for temporary purposes, is reasonably suitable for use and occupation.—Young v. Povich, Me., 116 Atl. 26.

44.——Lien.—Where a bank replevies warehouse receipts and, to get immediate possession, gives bond with a surety for the forthcoming of the property replevied, upon which a third person has a landlord's lien, such surety is a proper defendant in a suit by the landlord against the bank for conversion, and it is error to sustain a demurrer setting up such an alleged misjoinder.—Campbell v. Farmers' Bank of Boyle, Miss., 90 So. 436.

45. **Licenses** — Discriminatory. — Even if a municipal license tax of $2,500 imposed on wholesale peddlers, when considered with the license tax of $75 imposed on retail peddlers, is not so arbitrary and excessive as to amount to a denial to the former of the equal protection of the laws, the wholesale peddler's license tax is clearly unreasonable, in that, no question of public health, morals or safety being involved, the difference in the license tax imposed on wholesale peddlers and retail peddlers is so great that it can have no fair relation to differences between the business done by the two peddlers.—Roach v. Ephren, Fla., 90 So. 609.

46. **Master and Servant**—Casual Employment. —An oil well operator's employment of skilled mechanic engaged in business for himself to repair an engine under agreement to pay him his customary charge of $1.25 an hour for time required to make repairs held "casual" and not in the "regular course" of the business of the employer, within Workmen's Compensation Act, art. I, § 104; the term "regular course" meaning the normal operations which regularly constitute the business excluding incidental or occasional operations arising out of the transaction of the business, such as making repairs to premises, appliances, or ma-

chinery.—Callihan v. Montgomery, Pa., 115 Atl. 889.

47.——Driver's Negligence.—In an action for damages to an automobile in a collision, an instruction that defendant taxicab owner was liable for any negligent acts or omissions of its driver held proper as according with Laws 1915, c. 141, subc. 8, § 5, making employers responsible for the negligence of their drivers.—Rohan v. Sherman & Reed, Mont., 204 Pac. 173.

48. **Monopolies** — Pooling Contract. — Where two competing steamboat lines, common carriers, pooled their interests, agreeing to divide the earnings, and, if either carrier fail to make the allotted number of trips, such carrier should be charged on the basis of average tons handled and the average price per ton received, etc., held to establish a complete monopoly in transportation in interstate commerce between given points.—Lee Line Steamers v. Memphis, H. & R. Packet Co., U. S. C. C. A., 277 Fed. 5.

49. **Mortgages**—Foreclosure.—Where an undertaker and his stock salesman, a preacher, formerly the woman's pastor, together with a lawyer, took undue advantage of a woman 73 years of age and procured from her a mortgage of $10,000 on her farm in exchange for stock of doubtful value in the undertaker's company, and she was in the early stages of senile dementia at the time, equity will not aid in foreclosing the mortgage in behalf of the parties who gained this unfair advantage. —Walz v. Oser, N. J., 116 Atl. 16.

50.——Purchase by Beneficiary.—Beneficiary of trust deed is not prevented from purchasing on foreclosure because her husband is a trustee.—Smith v. Beard, Miss., 90 So. 592.

51. **Municipal Corporations**—Districting Village.—Where a village was divided into residential and business districts in pursuance of St. 1919, § 61.35, the village is liable for damages to property from putting it into a residential district.—Pera v. Village of Shorewood, Wis., 186 N. W. 623.

52.——Negligence.—On a street where concrete part of sidewalk extended 10 feet from property line and there was a grassed part 4 feet wide between concrete and curb, a boy was entitled to walk and run on the grassed portion in the nighttime, and it was negligence to leave an obstruction thereon during the night, into which the boy ran and was injured. —Long v. American Ry. Express Co., La., 90 So. 563.

53. **Negligence** — Imputability. — The negligence of the parent or guardian having custody and control of an infant in exposing it to danger will not be attributed to the child so as to preclude its right of action against a third person by whose negligence it is injured.—Prunty v. Tyler Traction Co., W. Va., 110 S. E. 570.

54. **Principal and Agent**—Gifts to Agent.—One acting as agent in procuring oral leases must account to his principal for gifts of interests in such oil leases and contracts, made to him by persons who dealt with him as agent, thereby giving him a private interest in oil leases acquired adverse to his principal and without his knowledge.—Texana Oil & Refining Co. v. Belchic, La., 90 So. 522.

55. **Railroads**—Duty to Public.—The use of machinery and appliances of the most approved character that are in general use, and appropriate to the service being rendered, and reasonably safe in use under the circumstances in which a railroad is operated, satisfies the requirements of the law as to the defendant's duty..—Seaboard Air Line Ry. v. Minor, Fla.., 90 So.. 611.

56. **Sales**—Acceptance.—Where such consideration paid by the principal was not paid in cash, but was paid by a draft drawn by the agent on the principal, the principal's payment of the draft, after his receipt of the offer, and before its acceptance and before the withdrawal of the offer by the party making it, does not amount to an acceptance of the offer.—Williams v. Johnson-Brown Co., Ga., 110 S. E. 497.

57. **Statutes** — Constitutionality.—Where the constitutionality of a statute is sought to be tested in a suit, the court will not decide such question unless necessary to a disposition of the case; and where a contract made under the provisions of the statute is void because of noncompliance with the terms of the statute, the constitutionality of the statute will not be decided.—Jackson County v. Worth, Miss., 90 So. 588.

58. **Street Railronds** — Contributory Negligence.—Plaintiff, when his horse was 15 feet rrom a street railroad, approaching it at a speed of from 5 to 8 miles an hour, having looked and seen a car just starting up 180 feet away, was not required to continue to look for it as he crossed.—Hoodenpyle v. United Rys. Co. of St. Louis, Mo., 236 S. W. 913.

59. **Taxation** — Drainage Districts. — Under Laws 1905, providing for incorporation of drainage districts, defining power of supervisors, and Rev. St. 1909, §§ 5507-5520, providing for appointing commissioners to assess benefits and for the levying of taxes, in doing which the supervisors exercise a special governmental function, such districts are not only public corporations and subdivisions of the state, but are municipal corporations within Const. art. 10, § 6, and Rev. St. 1919, § 12753 exempting from taxation the property of "counties and other municipal corporations."—State v. Little River Drainage Dist., Mo., 236 S. W. 848.

60.——"Market Value."—In determining the assessment value of property, as at "market value," it is the price at which a willing owner would sell and a willing purchaser would buy. —People ex rel. Szerlip v. Goldfogle, N. Y., 192 N. Y. S. 210.

61.——Transfer Tax.—Transfer tax held not to apply to ownership of stock in foreign corporation having real estate in New York, and not a real estate corporation.—In re McMullen's Estate, N. Y., 192 N. Y. S. 49.

62. **Vendor and Purchaser**—Good Faith.—In view of Civ. Code, art. 1881, declaring that engagements made through error, fraud, etc., are not absolutely null but voidable by the parties who have contracted under such influence, these defects, by reason of their latent character, are not permitted to affect injuriously third persons who have acted in good faith, and a purchaser of real estate from the owner of record is entitled to be recognized as the owner as against one in possession claiming that the deed was signed in error, that he failed to read it or have it read to him, as things outside the deed cannot be pleaded against such purchaser.—Gonsoulin v. Sparrow, La., 90 So. 528.

63.——Reasonable Time.—Time was not of the essence of the contract as regards date of consummation, though particular date was specified where there was nothing to indicate it, and vendor could not rescind for purchaser's failure to make cash payment provided for on the particular date, but, on purchaser's failure to pay on such date, must fix a definite date or allow him a reasonable time in which to perform.—Shrut v. Huselton, Pa., 116 Atl. 43.

64. **Wills** — Oral Request. — Executors who took no estate in land of testator cannot be held as trustees on their promise to carry out testator's oral commands as to disposition of the land different from that made by the will. —Porter v. Wolf, Pa., 116 Atl. 55.

65. **Workmen's Compensation Act** — Dependency.—Failure of a husband to support his wife and children for a considerable time prior to the accident which caused his death does not of itself prove that they were not actual dependents.—Merrill v. Penasco Lumber Co., N. M., 204 Pac. 72.

66.——Loss of Vision.—In a proceeding under the Workmen's Compensation Law, the test to be used to determine the extent of loss of vision is only an element of the evidence, and the board must determine what evidence it shall accept and the weight to be given to it, and the elements of vision that must be taken into account to determine the "useful vision," namely, "field vision" and "binocular vision;" the former meaning the general vision used in catching in sight, following and locating objects, and the latter being the vision of the two eyes acting together, used in determining depth, width, distance, and comparative placing of different objects.—Turpin v. St. Regis Paper Co., N. Y., 192 N. Y. S. 91.